No. 13163

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

[redacted] a corporation,

Appellant,

vs.

[redacted],

Appellee.

Opening Brief of Appellant Lama Company, a Corporation

[redacted]

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Attorneys for Appellant and Lama Company.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAMA COMPANY, a corporation,

Appellant,

vs.

UNION BANK, *et al.,*

Appellee.

Opening Brief of Appellant Lama Company, a Corporation.

Origin of the Appeal.

The matter commenced as a part of the bankruptcy proceedings involving one Charles Crowl, Bankrupt, in Bankruptcy No. 126319-T in the United States District Court, Southern District of California, Central Division, by the filing of a petition for determination of rental due subsequent to bankruptcy on December 29, 1961. [Clk. Tr. pp. 2-9.] An Order To Show Cause was issued by the Referee on the same date. [Clk. Tr. p. 10.] Subsequently, a response was filed on behalf of Union Bank. [Clk Tr. p. 11] and on behalf of the Trustee in Bankruptcy. [Clk. Tr. p. 15.] After hearing before the Referee in Bankruptcy on January 11, 1962, the Referee made Findings of Fact, Conclusion of Law and Order re Post Bankruptcy Rent. [See Clk. Tr. pp. 39-43.] This was filed on March 15, 1962, and thereafter the Appellant filed a Petition for Review with the

District Court. [See Clk. Tr. p. 44.] On May 22, 1962, the United States District Court filed and entered its Order affirming the decision of the Referee in the premises. [See Clk. Tr. pp. 47-48.] On June 20, 1962, the Appellant and Petitioner Lama Company, a corporation, filed its Notice of Appeal [Clk. Tr. p. 50.]

Jurisdictional Statement.

The original jurisdiction of the District Court was under the *National Bankruptcy Act.* The jurisdiction of this Court on this appeal would lie under Section 1291, Title 28, *United States Code.*

Statement of Facts.

The statement of the case as presented by the Referee in his Certificate on Review to the District Court is essentially accurate. The Court's specific attention is called to his summary contained between line 10, p. 35 and line 30, p. 36, of the Clerk's Transcript in this cause.

For ease of presentation, the statement of the case is basically quoted upon the Referee's Certificate and the reference is there found. Prior to bankruptcy, the bankrupt had occupied, under a lease for his business purposes, certain premises owned by Lama Co. and located at 11659-61 and 11665-67 McBean Drive, El Monte, California. The bankrupt had been engaged in the business of a plastic sheet manufacturer. The lease provided for a monthly rental of $743.00, plus an additional monthly charge of $16.00 for insurance premiums. Upon taking possession of the premises and inventorying the bankrupt's assets located thereon, the Trustee learned that approximately two-thirds of the

machinery and equipment located therein was subject to encumbrances held by the Union Bank. This fact was not disputed at the hearing held before the undersigned Referee in Bankruptcy to determine the amount of the landlord-Lama Co.'s claim for administrative rent.

The amount of the Union Bank's encumbrance was such that the Trustee determined that the bankrupt estate had no equity in the heavy machinery and equipment subject to the encumbrance. Prior to bankruptcy, the bankrupt with the agreement of the Union Bank, had arranged with an auctioneer to sell all of the machinery and equipment and other assets, including both that subject to the encumbrance and that which was free and clear. When the Trustee (then the Receiver) originally took possession of the premises, he determined to go forward jointly with the Union Bank with the previously agreed upon auction.

As found by the Referee in bankruptcy [Find. of Fact IV, Clk. Tr. p. 40], after July 30, 1961, the Trustee in bankruptcy determined to abandon any interest in the conditional buyer's and lessee's rights in the machinery and equipment subject to the encumbrance held by the respondent Union Bank. It was undisputed at the hearing that the Trustee's liability for administrative rent commenced on June 1, 1961, and terminated on August 24, 1961, at which time the premises were returned to the landlord Lama Co., with the joint auction sale conducted by the Trustee and the Union Bank. The total rent called for by the lease for said period would have been the sum of $2,105.28. Throughout the period from the onset of bankruptcy and August 24, 1961, the landlord and pe-

titioner Lama Co. was excluded from the premises by signs and by securing devices set up by the Trustee. The Referee reasoned that in as much as the articles of personalty which constituted the assets of the bankrupt estate amounted to approximately one-third (both in dollar value and in physical space occupied) of the total of the personalty located on the premises, only one-third of the total rent for the period in question would be ascribable to the Trustee. This amount, together with insurance premiums totalling $44.24 and the sum of $60.00 (being the cost of repairing certain damage to the premises occasioned by the Trustee's occupancy), or a total of $806.00, was fixed as the Trustee's liability for administrative rent. The Referee did make the finding that Union Bank had received value in that the subject premises were utilized to store machinery and equipment on its behalf, but no summary jurisdiction, in the view of the Referee, existed as to the Union Bank to enable the Court to make an order of payment respecting the same. [See Clk. Tr. p. 41, lines 9-23.]

Specifications of Error.

1. The District Court erred in finding a lack of jurisdiction to adjudicate the present controversy.

2. The District Court erred, in the alternative, in failing to find that the bankruptcy Trustee was totally liable for post bankruptcy rent, and should seek contribution from Union Bank if necessary.

ARGUMENT.

A. The Bankruptcy Court Has Jurisdiction to Adjudicate the Present Controversy.

It is clear that the Bankruptcy Act confers jurisdiction in both law and equity in connection with controversies arising in bankruptcy. See Section 2 of the *Bankruptcy Act; Boston Terminal Co. v. Mutual Savings Bank Group,* 127 F. 2d 707; cf. *Westall v. Avery,* 171 Fed. 626. The Bankruptcy Court has power in a summary proceedings to adjudicate title to property in the actual or constructive possession of the trustee. *Magnolia Petroleum Co. v. Thompson,* 106 F. 2d 217; *In the matter of American Fidelity Corp., Ltd.,* 28 Fed. Supp. 462 (S. D. Cal.) It can adjudicate lien or security status. *In re San Clemente Electric Supply,* 101 Fed. Supp. 252 (S. D. Cal.). It has long been clear that it may exercise jurisdiction over matters pertaining to bankruptcy administration. See Vol. 2, p. 449 *et seq., Collier on Bankruptcy* (14th Edit.), *City of Long Beach v. Metcalf,* 103 F. 2d 483.

The question here is simply refined to the obvious query: Does the Bankruptcy Court have the power, and indeed the duty to adjudicate post bankruptcy rent, as to the parties involved in the same where property occupying the landlord's premises is in the custody of the trustee? Starting with the concept of *Watters v. Dunn,* 56 F. 2d 223 (S. D. Cal.), the answer seems obviously affirmative. A landlord's rights are not lost or held in a vacuum because a bankruptcy petition is filed. It is implicit that the user of premises has an implied duty to pay for the same unless the owner agrees that the premises are furnished gratuitously.

Post bankruptcy rental is one of the features and may be one of the "controversies" concerned in post bankruptcy proceedings. Both as a matter of logic and of law, it would seem that the Bankruptcy Court has the right and the duty to fully adjudicate.

Under the factual circumstances posed, the bankruptcy trustee would have the duty to pay rent to the landlord for utilization of premises occupied by or on behalf of the trustee, unless a coordinate duty of obligation arose in someone else or some other party to the proceedings. This was the purpose of the petition of the landlord, *viz.* to determine rental allocation. See Document Number 1 certified by the referee in his certificate. [Clk. Tr. pp. 2-9.] As will be observed in the documents certified as 3 and 4, responses were filed, admitting and creating issues on certain of the factual situations set up in the petition. The Referee determined from the testimony at the hearing that although the trustee had control and domination of the landlord's premises throughout the period in question, [see Find. of Fact III and IV], two-thirds of the chattels held therein were abandoned to the Union Bank and one-third were accepted by the trustee in bankruptcy. Accordingly, the Referee reasoned the trustee should be liable for only one-third of the rent. To suddenly refuse jurisdiction to require rental payment from the respondent Union Bank under such circumstances is tantamount to instructing petitioner to institute suit in the State Court against the respondent trustee and

respondent Union Bank. (There being no written instrument to go by, obviously petitioner would be obliged to take the cautious course of suing both parties involved in the utilization of the premises. Otherwise, entirely dissimilar decisions might be reached by the two different courts.) The philosophy of the Bankruptcy Act and its sections regarding administration is to centralize and simplify legal proceedings relating to bankruptcy. The implication of denial of jurisdiction in the present instance would necessarily mean the proliferation of litigation. Although legal difficulty is not a sufficient reason in itself, nevertheless increasing litigation to various courts runs contrary to the legal and judicial trend of the law and the theory of the *Bankruptcy Act.* It is sometimes said that once the bankruptcy petition has been filed, the bankruptcy court's jurisdiction is paramount and no other court may by order or decree assume this jurisdiction. In fact, restraining orders may be issued to enjoin state court action. See, generally, *American Gramaphone Co. v. Leeds and Kaplan Co.,* 174 Fed. 158; *in re San Clemente Electric Supply,* 101 Fed. Supp. 252 (S. D. Cal.). Certainly the disaffirmance of a lease is well within the bankruptcy court jurisdiction. *Matter of Freeman,* 49 Fed. Supp. 163. The Bankruptcy Act and the court acting thereunder follows the theory that summary jurisdiction exists to protect the bankruptcy estate from imposition. See *Governor Clinton Co. v. Knott,* 120 F. 2d 149. Here the Union Bank will have benefited

for storage purposes from the period commencing with the filing of the bankruptcy petition to August 24, 1961. If the State Court adjudicates that the trustee by reason of mere fact of possession of the premises is totally liable, obviously the bankruptcy estate itself suffers by the Union Bank's imposition. The alternative is that the landlord must suffer with the loss of two-thirds of the applicable rent. The equitable conscience of the court should be disturbed by such travesty of conscience. It is respectfully submitted that technicalities and legal niceties should not obscure the duty of the Bankruptcy Court to fairly adjudicate the controversies arising directly out of and a part of the bankruptcy administration.

B. If the Bankruptcy Trustee Occupied the Premises to the Exclusion of the Landlord, He May Be Totally Liable for Post Bankruptcy Rent.

This argument, as the court will realize, is alternative to the first argument point. It is undisputed that the trustee occupied and held the premises adversely to the landlord up to the date of August 24, 1961 when the sale of chattels was held. This possession was open, notorious and adverse to the landlord's rights. In fact, an award was made to the landlord for damages inflicted on the premises by the trustee or his agents. Under the ordinary principles of law, it could be argued that if a person occupied premises, he would be fully liable to the owner thereof, regardless of whose property was stored within the premises. An argument

of some surface cogency might be made that the trustee should be liable in the bankruptcy proceedings to the landlord for the full amount of the rent, to wit $2,-105.28, but would have the right to sue in the state courts for reimbursement by the Union Bank. This, of course, would achieve fairness to all parties and the court may be so minded to reverse the order below and so instruct the referee. The disadvantage to such a procedure is that it also requires the proliferation of litigation and the utilization of the services of the general jurisdiction state court for a controversy which seems completely settled in bankruptcy proceedings.

Conclusion.

It is respectfully submitted that the order of the referee below should be reversed, and that either the referee below required to make an order assuming jurisdiction over the respondent Union Bank and ordering payment for the remaining balance of the rent to the petitioner landlord, or alternatively ordering payment to the petitioner landlord by the trustee and instructing the trustee to institute suit in the state courts for reimbursement from the respondent Union Bank.

Respectfully submitted,

JULIUS A. LEETHAM,
Attorney for Appellant, and Petitioner, Lama Company.

Certification.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JULIUS A. LEETHAM,
Attorney for Appellant, Lama Co.